



Administrative Tribunal

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AT/DEC/631
19 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 631

Cases No. 673: HEAPS 1
No. 681: HEAPS 2

Against: The Secretary-General
of the International
Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding;
Mr. Mikuin Leliel Balanda; Mr. Francis Spain;

Whereas at the request of Erick Heaps, a former staff member
of the International Maritime Organization (hereinafter referred to
as IMO), the President of the Tribunal, with the agreement of the
Respondent, extended to 15 June 1992, the time-limit for the filing
of an application to the Tribunal;

Whereas, on 17 June and 14 July 1992, the Applicant filed two
applications (the first and the second application), requesting the
Tribunal, in the first application, to:

"rule as follows:

- (a) That the Applicant's adverse comments on his
periodic performance report for the period 1 May
1990 to 28 February 1991 ... deserve[d] ... a
specific and circumstantial answer on behalf of
the Respondent;
- (b) That the contested periodic report was of
doubtful validity because the Applicant had
never received a job description...;
- (c) That, ..., the Head of the Printing Section and
the Director of the Conference Division, ...,
should have initiated an inquiry at an early
stage if his performance was found to be

unsatisfactory instead of waiting until the first periodic report was due and only at that stage making a series of complaints, not previously discussed with the Applicant, about the quality and quantity of his output, his attitude, and other matters, based largely on written reports which the Applicant was not shown...;

(d) That the Applicant was denied due process in his internal appeal, in particular because the Joint Appeals Board:

- (i) interviewed his supervisors in his absence and without his knowledge;
- (ii) received and examined documents provided by the Head of the Personnel Section none of which were shown to the Applicant until some of them were produced by the [Joint Appeals] Board at the oral hearing ...;
- (iii) did not ... ask the Respondent to reply to the appeal or to comment on the Applicant's allegations of inaccuracy, unfairness and bias in his performance report;

(e) That the Respondent was remiss in failing to ... withdraw the contested periodic report and replace it by a more objective one...

...

(g) That the Applicant should be paid by the Respondent a sum equal to one year's net base salary as compensation for the injury he has suffered."

and in the second application:

"to rule as follows:

(a) that the decision by the Respondent not to renew the Applicant's second contract, ..., was procedurally and administratively defective and must be set aside...;

(b) that the Applicant was denied due process in his internal appeal, in particular because the Joint Appeals Board:

- (i) did not ask the Respondent to reply to the appeal;
- (ii) made its recommendation to the Respondent on the substance of the appeal without having addressed itself to the merits of the Applicant's arguments...;

...

(d) that the Applicant should be paid ... a sum equal to two years' net base salary as compensation for the injury he has suffered."

Whereas the Respondent filed his answer on 10 November 1992, requesting that cases No. 673 and No. 681 "be joined for purposes of adjudication";

Whereas the Applicant filed written observations on 29 January 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 1 May 1990, on a one year fixed-term appointment at the G-6, step III level, as a Machine Operator in the Printing Section of the Conference Division.

The Applicant's performance during the period 1 May 1990 through 28 February 1991, was evaluated in a performance evaluation report dated 4 April 1991, prepared by his supervisor, the Head, Printing Section. The Head, Printing Section, stated, in part, that the Applicant "had a wide range of experience in all types of work and printing presses". It was expected that he "would be able to pass on his trade experience to IMO trained printing staff, he was to be our leading printer and it was for these reasons he was given a high grade and step." He added:

"...To date [the Applicant] has yet to reach the standard required of him in quality of work, quantity of work and his attitude towards it, his performance is very disappointing. ...

I would therefore only recommend a further six months of contract without continuation unless a dramatic improvement takes place."

The Director, Conference Division, who acted as Second Reporting Officer, rated the Applicant as "a staff member who maintains only a minimum standard" and stated that he supported "the recommendation concerning the extension of [the Applicant's] contract for six months only, with the hope that his performance will greatly improve during this period."

On 15 April 1991, the Applicant, in accordance with paragraph 10 of PER/G/72/190, wrote to the Director of the Administrative Division, through the Head of the Printing Section and the Director of Conference Division, contesting the ratings in his report and requesting that the report be "withdrawn" from his personnel file and "replaced with an objective assessment" of his work. In a reply dated 6 June 1991, the Head, Personnel Section, informed the Applicant that the Secretary-General had listed in an attachment "those areas of your performance requiring improvements within the period of your current contract" and informed him as follows: "your performance will be assessed on a monthly basis and you will be advised in each case with regard to the status thereof."

On 20 June 1991, the Applicant sought clarification of the administrative decision contained in the communication of 6 June 1991. On 10 July 1991, the Head, Personnel Section, informed the Applicant that since he had acted in accordance with the requirements of PER/G/72/190 "the question of withdrawing the Report and issuing a new one does not arise". On 31 July 1991, the Applicant requested the Secretary-General to review the decision not to remove his performance evaluation report from his personnel file. On 23 August 1991, the Head, Personnel Section, informed the Applicant that the decision would be maintained.

On 18 September 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 24 October 1991. Its findings and recommendations read, in part, as follows:

"5. The Board is unanimous in its surprise at the apparent absence of direct, constructive and timely discussion between the supervisors and [the Applicant] concerning deficiencies raised in the periodic report...

6. The Board believes that more open, frank and timely discussion between the supervisors and [the Applicant] --i.e. better techniques for resolving operational problems-- as regards the day-to-day performance of the latter would have prevented what now amounts to unverifiable and greatly divergent claims and counter-claims...

...

8. The Board feels that, regardless of the merits of claims and counter-claims by the parties concerned, it is inappropriate to blame [the Applicant] for not having lived up to expectations which were not made clear to him in an objective and verifiable manner (...).

9. In this connection the Board also believes that ... a timely and thorough assessment of reference letters received from [the Applicant's] previous employers, ... would have led to a more judicious selection of a candidate for the vacant post...

RECOMMENDATIONS

A. Taking into account the proper reporting procedures as provided in paragraph 14 of document PER/G/72/190 of 21 February 1972, the supervisor should be invited to substitute the contested report.

B. The Board also strongly recommends that the procedure regarding periodic reports be reviewed and, to this effect, that a new circular be issued taking into account the changes introduced in the structure of the Organization and the lessons learned and experience acquired over the past two decades as regards periodic reporting.

C. The Board further recommends that consideration be given to the establishment of an appropriate machinery dealing with contestations by supervisees in order to avoid a systematic recourse to the Joint Appeals Board. Such matters should be dealt with at the operational level.

D. The Board recommends with emphasis that supervisors in the Secretariat and relevant staff in Personnel Section be allowed to benefit from the variety of short courses and workshops on interviewing and recruitment techniques offered by educational establishments and the personnel management industry. Courses could also be conducted in-house."

On 9 December 1991, the Head, Personnel Section transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided as follows:

- "(a) that the initial decision not to withdraw the report and replace it by a revised version should stand;
- (b) to consider carefully, the Board's recommendation for a review of the procedures concerning periodic reporting;
- (c) that inasmuch as an appropriate machinery (as specified in staff rule 111.1) already exists to consider administrative decisions contested by staff members, no new machinery should be established; and
- (d) to consider carefully, the Board's recommendations concerning the training of relevant staff on interviewing and recruitment techniques."

On 12 June 1992, the Applicant filed with the Tribunal the first application.

In the meantime, the Applicant's appointment had been extended for a further fixed-term period of six months, through 31 October 1991. On 3 October 1991, the Director, Administrative Division, informed the Applicant as follows: "I have been informed by the Head, Printing Section and the Director, Conference Division, that the improvement looked for in your performance has not taken place. Accordingly, I regret to inform you that, as stipulated in staff rule 109.6 (...your present appointment, which expires on 31 October 1991, will not be renewed." He attached to the

communication a performance evaluation report, on the Applicant's services from 1 March to 30 September 1991, in which the Applicant had been rated, "on the whole, an unsatisfactory staff member". The Director, Conference Division, in his general comments, stated that, to his regret, the Applicant had "not shown to his direct supervisors that he can make a positive contribution to the work of the Section."

On 10 October 1991, the Applicant requested the Secretary-General to review this decision. In a memorandum dated 24 October 1991, the Director, Administrative Division, informed the Applicant that his appointment would not be extended. On 21 November 1991, the Applicant lodged a second appeal with the Joint Appeals Board (JAB) against this administrative decision. The Board adopted its report on 31 March 1992. Its findings and conclusions read as follows:

"The Board made a thorough examination of the documents at hand and in accordance with staff rule 109.6(a) ('Expiration of Fixed-Term Appointments') it is apparent that the Administration's actions are in conformity thereto.

The Board concluded that the appellant had no legal expectancy of renewal. Fixed-term appointments do not carry any right of renewal. Staff rule 109.6(a) is very clear and the letter of appointment signed by the appellant confirms this position.

Accordingly, the Board agrees with the Administration's decision not to renew the fixed-term contract of [the Applicant] which expired on 31 October 1991."

On 27 April 1992, the Head, Personnel Section transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General "accepts the Board's findings...".

On 17 July 1992, the Applicant filed with the Tribunal, the second application.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance evaluation report for the period 1 May 1990 to 28 February 1991 was thoroughly inaccurate, unfair and biased.

2. The standards by which the Applicant was judged were inappropriate since they were based on assumptions about his role, of which he was not informed until after the report had been prepared. The job description with which the Applicant had been furnished did not specify such requirements.

3. The report was prepared with a view to terminating the Applicant's employment. At no time did the Head of the Section make contact with the Applicant about his work.

4. The Applicant had a legitimate expectancy that his performance, if properly assessed, would lead to a renewal of his contract.

Whereas the Respondent's principal contentions are:

1. The evaluation of the Applicant's performance was in accordance with the facts and not influenced by a desire to separate the Applicant from service.

2. The Applicant was given ample opportunity to improve his performance and failed to do so, despite being advised of the consequences.

3. There were no procedural defects in dealing with the Applicant's evaluation and separation.

The Tribunal, having deliberated from 3 to 19 November 1993, now pronounces the following judgement:

- I. By common consent, the Tribunal joins the two cases: a single judgement will therefore cover both.

- II. The first issue raised by the Applicant (case No. 673) relates almost entirely to the assessment of his work, prepared on 2 April 1991, for the period of 1 May 1990 to 28 February 1991. It

contained a recommendation by the Applicant's Supervising Officer (Head, Printing Section, Conference Division) that the Applicant, whose one-year fixed-term contract was to expire on 30 April 1991, should be given a further "six month contract without continuation unless a dramatic improvement takes place". This recommendation was supported by the Director, Conference Division, who described the Applicant as a staff member "who maintains only a minimum standard".

III. On 15 April 1991, in a memorandum to the Director, Administrative Division, the Applicant described this report as "thoroughly inaccurate, unfair and biased". He commented on all aspects of it in order to sustain and substantiate his criticisms and objections. His main plea was that since he was never told what were his duties, functions and responsibilities, it was utterly unjust and unfair to assess his work as falling short of the expectations of his supervising officers.

IV. The Tribunal has examined all the evidence in this context and finds that, on numerous occasions, the Applicant was made aware of his duties and of what was expected of him. Thus, in a letter dated 11 April 1990, sent to him by Head, Personnel Section, which offered him the appointment in the Printing Section, his attention was specifically drawn to Vacancy Notice No. G.S.90-1 issued on 15 February 1990 (the same date when a short advertisement for the job appeared in the newspaper "Daily Mail"). In the Vacancy Notice, the "main duties and responsibilities" were described and "qualifications and experience" required of candidates were also indicated. The Applicant accepted the appointment on 18 April 1990.

The Applicant now contends that he did not receive a copy of the Vacancy Notice. In the view of the Tribunal, he could have obtained it at any time after 11 April 1990, when he received the offer of the appointment.

V. Thus, the Tribunal cannot entertain the Applicant's assertion that he was wholly unaware of what his duties and responsibilities were. This conclusion is strengthened by a memorandum to the Director, Conference Division sent to him on 15 April 1991. This memorandum shows that the Applicant had several discussions, by telephone or otherwise, about the nature of his work and about the terms and conditions of his appointment. He was also supplied with appropriate documents; his tenure was clearly for a fixed-term of one year, beginning 1 May 1990.

VI. The Tribunal notes that the Applicant went on to urge, that in view of the rebuttal he had sent to the Director, Administrative Division on 15 April 1991, his adverse performance report for work during 1 May 1990 to 28 February 1991, should be "withdrawn and replaced with an objective assessment of my work and a realistic assessment of my competence and potentialities". In reply, the Respondent drew the Applicant's attention to the Secretary-General's memorandum No. PER/G/72/190 dated 21 February 1972 and declined to withdraw the report. The relevant section of this memorandum reads:

"10. If a staff member so wishes, he may, not later than ten working days after signing the report, submit a written statement containing explanations or counter-comments on part or on all of the report. This statement will be submitted through the staff member's reporting officers to the Head of Administrative Division for inclusion, with the report to which it relates, on the staff member's personal file".

VII. The Tribunal cannot take exception to the measure adopted by the Respondent, but notes that in the United Nations the procedure for handling rebuttals of adverse performance reports is in many respects different and would seem to offer more protection to staff.

VIII. On the Secretary-General's declining to withdraw the report in question, the Applicant took his case to the Joint Appeals Board (JAB), which recommended on 24 October 1991, that the Supervisor of

the Applicant's work "should be invited to substitute the contested report". The Respondent did not accept this recommendation and adhered to his earlier decision that both the adverse report and the Applicant's rebuttal should be preserved in the Applicant's personnel file, in accordance with PER/G/72/190 of 21 February 1972.

IX. The Tribunal notes that before taking these decisions, the Respondent consulted his Legal Office on 9 August 1991 and 8 November 1991. On both occasions, he was advised against withdrawing or replacing the contested report. On 9 August 1991, the Legal Office cited the rule quoted above and on 8 November, it advised inter alia:

"5. The report can only be withdrawn where it has been proved to be an inaccurate assessment.

6. The APB-GS (Appointment and Promotion Board - General Service) to which the matter was referred initially did not find the assessment inaccurate. Rather they recommended that the administration establish guidelines and targets for monitoring of [the Applicant's] performance".

X. The Tribunal notes that on 18 April 1991, the Appointment and Promotion Board - General Service (APB-GS) reviewed the case "extensively" and recommended a six-months extension of the contract and "that the incumbent be informed of the targets he would have to fulfil over the next six months, it being understood that the Personnel [Section] would be involved in the setting of the targets and the monitoring of performance, preferably at monthly intervals. The results of these assessments would be communicated to the incumbent".

XI. These recommendations were accepted by the Respondent. On 6 June 1991, the Head, Personnel Section, conveyed to the Applicant a list of "those areas of your performance requiring improvements within the period of your contract". He concluded: "Accordingly, your performance will be assessed on a monthly basis and you will be

advised in each case with regard to the status thereof". Other steps were discussed "regarding the help we can give to [the Applicant] to reach a satisfactory standard of production". In practice, the monthly reports envisaged by the APB and accepted by the Respondent, were not prepared. On 5 August 1991, the Head, Printing Section, reported to the Head, Personnel Section, as follows:

"With regard to the monthly reports on the performance of [the Applicant] I regret to say that as yet I have been unable to assess him constructively.

For the month of May he was on annual leave for 5 1/2 days plus 2 days sick leave. For the month of June the Printing Section was subjected to a major reorganization and virtually nothing was printed and for the month of July he was on sick leave for the whole of the month".

XII. Finally, a second report was prepared on the Applicant's work for the period of 1 March to 30 September 1991. As a result, a further extension was denied. The Applicant's fixed-term contract expired on 31 October 1991.

XIII. There is, one aspect of this case which has caused the Tribunal some concern. Part G of the Applicant's performance report was not completed. Like the APB-GS the Tribunal finds that the lack of "internal communication between the staff member and his supervisor and colleagues" could and should have been avoided. The omission to fill in Part G cannot be considered sufficient to impugn the Respondent's conclusions about the continued employment of the Applicant, but it does, in the opinion of the Tribunal, reflect adversely on an Administration which failed to observe its own rules.

XIV. The Tribunal, however, cannot sustain the plea that the Applicant was wrongly assessed or that the Respondent abused his discretionary power or that he was acting in "an arbitrary,

unreasonable and inconsiderate manner". The Tribunal notes that the Applicant was given six months to improve his performance which was reviewed by the APB-GS in April 1991 and finally by the Director, Conference Division, on 25 September 1991.

XV. The second case (No. 681) is essentially a continuation of the first case discussed above. The Applicant states in his rebuttal letter dated 15 April 1991, that the first adverse report of 2 April 1991, was "deliberately designed to prepare the ground for the termination of my service in six month's time". He argues that if his work had been fairly assessed during his one year fixed term contract, he would have had a legal expectancy for the renewal of his contract. As such an expectancy could no longer be fulfilled, as a "practical proposition", he should be paid "sum equal to two years' net base salary as compensation for the injury suffered".

XVI. The Tribunal has consistently held that holders of fixed-term contracts do not have an automatic right to an extension of their contracts. Performance assessment of staff constitutes one of the factors to be considered in extending fixed-term contracts. The Tribunal has established jurisprudence that in considering whether there was an expectancy of the extension of such contracts, the totality of circumstances should be taken into account. In the present instance, the service of the Applicant was for a period of 18 months. The Respondent had made it clear in his letter, offering the appointment, that "the post will be financed from the Printing Fund and has been established initially until 31 December 1991 ... continuation of the post beyond that date will depend on the decision which may be taken by the Council and Assembly".

XVII. In these circumstances, the Tribunal cannot find any reason why the Respondent should take recourse to devious methods, as repeatedly alleged by the Applicant, to separate him, when in terms of staff rule 109.6, and under the circumstances of this case, he

had complete freedom to allow a fixed-term contract to lapse on the specified date of expiration and without prior notice.

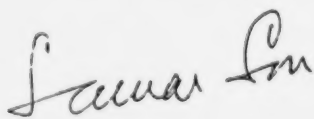
XVIII. In addition, the Tribunal finds, that apart from some hints of a cool relationship between the Applicant and his supervisor, the Head of Printing Section, Conference Division, there is no indication of any bias or prejudice.

XIX. Finally, the Tribunal finds that while there are features in this case which were not completely in keeping with the existing Rules and Regulations, they do not vitiate the decisions of the Respondent not to withdraw or replace the adverse report on the Applicant's work from April 1990 to February 1991 and, not to extend his fixed-term contract beyond 31 October 1991.

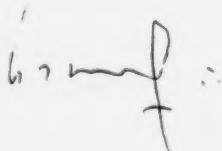
XX. For the foregoing reasons the application is rejected.

(Signatures)

Samar SEN
President



Mikuin Leliel BALANDA
Member



Francis SPAIN
Member



New York, 19 November 1993



R. Maria VICIEN-MILBURN
Executive Secretary